

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Improving Public Safety Communications in the |) | WT Docket 02-55 |
| 800 MHz Band |) | |
| |) | |
| Consolidating the 800 and 900 MHz |) | |
| Industrial/Land Transportation and Business |) | |
| Pool Channels |) | |
| |) | |
| Amendment of Part 2 of the Commission's Rules |) | ET Docket No. 00-258 |
| to Allocate Spectrum Below 3 GHz for Mobile |) | |
| and Fixed Services to Support the Introduction |) | |
| of New Advanced Wireless Services, Including |) | |
| Third Generation Wireless Systems |) | |
| |) | |
| Petition for Rulemaking of the Wireless |) | RM-9498 |
| Information Networks Forum Concerning the |) | |
| Unlicensed Personal Communications Service |) | |
| |) | |
| Petition for Rulemaking of UT Starcom, Inc., |) | RM-10024 |
| Concerning the Unlicensed Personal |) | |
| Communications Service |) | |
| |) | |
| Amendment of Section 2.106 of the Commission's |) | ET Docket No. 95-18 |
| Rules to Allocate Spectrum at 2 GHz for Use by |) | |
| the Mobile Satellite Service |) | |

ORDER

Adopted: January 24, 2005

Released: January 25, 2005

By the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Order*, we consider the Motion for Partial Stay (Motion) filed by the Land Mobile Communications Council (LMCC)¹ seeking stay of Section 90.621(f) of the Commission's Rules² and the Opposition of Nextel Communications Inc. to Motion for Partial Stay (Opposition).³ Section 90.621(f) permits 900 MHz Business or Industrial/Land Transportation (B/ILT) licensees to apply to modify their

¹ Land Mobile Communications Council, Motion for Partial Stay (filed Jan. 12, 2005) (Motion).

² 47 C.F.R. § 90.621(f). This rule section was amended in the Commission's *800 MHz Report and Order*. See Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order*, 19 FCC Rcd 14969 (2004) as amended by Erratum, DA 04-3208, 19 FCC Rcd 19651 (2004), and Erratum, DA 04-3459, 19 FCC Rcd 21818 (2004) (*800 MHz R&O*). The cited rule took effect on January 21, 2005. See 69 FR 67823 (Nov. 22, 2004). LMCC requests that the stay "affect only those stations whose licenses were granted since the adoption date of the *Report and Order* in the instant proceeding." See *Motion* at 2.

³ Nextel Communications, Inc., Opposition to Motion for Partial Stay (filed Jan. 20, 2005).

licenses from the Private Land Mobile Radio (PLMR) category to the Commercial Mobile Radio Service (CMRS) category.⁴ LMCC urges that the stay is necessary: (a) in light of “[n]ew evidence since the adoption of the Commission’s 800 MHz Order”⁵ that speculative applications have been filed for 900 MHz Band channels,⁶ and (b) because the Commission allegedly has not provided “appropriate interference protections” for operations in the 900 MHz Band.⁷ Nextel opposes the *Motion* and contends that LMCC’s concerns may be met by the Commission’s maintaining the current freeze on the acceptance of new 900 MHz applications⁸ and adopting a new regulatory framework for the band. For its part, Nextel represents that it will withdraw “over half” of its pending 900 MHz applications⁹ and submits that its remaining 900 MHz applications and those of others should be subject to “vigorous” review for conforming to Commission standards. Herein, we find that LMCC has not met the standards for a stay of the Commission’s Rules, maintain the *900 MHz Freeze* in force, defer processing of Nextel’s 900 MHz “ACI-900” applications, and affirm that licensees must establish their eligibility for spectrum.

II. BACKGROUND

2. As described in the *800 MHz R&O*, the 800 MHz band is being reconfigured to separate public safety, critical infrastructure industry (CII), and other “high site” non-cellular systems from “low site” Enhanced Specialized Mobile Radio (ESMR)¹⁰ systems that use high-density cellular architecture.¹¹ Of particular relevance to LMCC’s Motion, the *800 MHz R&O* noted that Nextel, in order to continue serving its subscribers, must shift some of its operations from the 800 MHz band to the 900 MHz band. This requires that Nextel have access to sufficient 900 MHz “green space” spectrum. Subsequent to the release of the *800 MHz R&O*, ACI 900, Inc. (ACI-900), a Nextel subsidiary, made a mass filing of applications for 900 MHz channels. However, there was no indication from either ACI-900 or Nextel that the requested channels would be used to provide 900 MHz green space. In addition, the applications raised eligibility and channel loading issues. Accordingly, primarily to preserve the 900 MHz green space, the Wireless Telecommunications Bureau instituted a freeze on applications for new 900 MHz B/ILT licenses that is still in effect.¹²

⁴ The 900 MHz Band encompasses spectrum in the 896-901 MHz / 935-940 MHz band. Section 90.621(f) provides that: “Licensees of channels in the Business/Industrial/Land Transportation Categories in the 896-901/935-940 MHz bands may request a modification of the license, *see* § 1.947 of this chapter, to authorize use of the channels for commercial operation. The licensee may also, at the same time, or thereafter, seek authorization to transfer or assign the license, *see* § 1.948 of this chapter, to any person eligible for licensing in the General or SMR categories. Applications submitted pursuant to this paragraph must be filed in accordance with the rules governing other applications for commercial channels, and will be processed in accordance with those rules.” 47 C.F.R. § 90.621(f).

⁵ *Motion* at 4.

⁶ *Id.*

⁷ *Id.* at 5.

⁸ *See* Wireless Telecommunications Bureau Freezes Applications in the 900 MHz Band, *Public Notice*, 19 FCC Rcd 18277 (Sept. 17, 2004) (*900 MHz Freeze Order*).

⁹ *Opposition* at 9. We assume that Nextel refers to the applications filed by its subsidiary, ACI-900, Inc.

¹⁰ For a definition of ESMR, *see 800 MHz R&O*, 19 FCC Rcd at 15060-15061 ¶¶ 172-173.

¹¹ For an explanation of a high-density cellular architecture system *see id.* at 15060-15061 ¶¶ 172-174.

¹² *See 900 MHz Freeze Order*, 19 FCC Rcd at 18277-78. We note that the freeze applies only to applications for new licenses, not to applications for modification of existing licenses and not to applications for assignment of license or transfer of control of a licensee. *Id.* at n. 8.

III. DISCUSSION

A. LMCC Has Not Met Commission Standards for a Stay.

3. The Commission evaluates motions for stay under well-settled precedent. To warrant a stay, a movant must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.¹³ We find that LMCC has not satisfied any of these criteria.

1. Movant Has Not Shown It Would Prevail on the Merits.

4. As an initial matter, we note that LMCC has not represented that it would prevail on the merits were it to seek Commission or judicial review of that portion of the *800 MHz Report and Order* which amended Section 90.621(f). Instead, it asks us to find that two other parties, the National Association of Manufacturers and LMCC member, MRFAC, Inc.,¹⁴ (hereinafter NAM/MRFAC) are likely to prevail in their joint *Petition for Reconsideration* filed on December 22, 2004.¹⁵ There, NAM/MRFAC observed that the Commission declined to adopt anti-trafficking rules for 900 MHz Band licensees in the *800 MHz R&O* because it had “observed no speculative runs on 900 MHz PLMR spectrum.”¹⁶ LMCC submits that “[n]ew evidence ... may indicate otherwise and will likely be provided as evidence in comments to the [NAM/MRFAC] petition.”¹⁷ It believes that said comments will disclose the “pitfalls” of permitting CMRS operation in the 900 MHz Band “without an appropriate holding period and without appropriate interference protections.”¹⁸ LMCC submits that its’ Motion, together with “forthcoming comments by the LMCC on this issue represents [*sic*] a new industry-wide position that has not been presented to the Commission heretofore.”¹⁹

5. The issue of modification of PLMR licenses to permit CMRS operation has been at issue in this proceeding, and known to LMCC, since 2002.²⁰ LMCC and others had full opportunity to register their positions on the issue during the comment and reply comment cycle of this proceeding and prior to the time the *800 MHz R&O* was adopted. The bare claim that there is a “new industry-wide position” on the issue, even assuming that such a position exists, without more, is an inadequate basis to support a stay.²¹ Moreover, we cannot justify staying a rule developed after careful consideration of a full record

¹³ See *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Petroleum*); see also *Washington Metropolitan Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) (*WMATC*).

¹⁴ MRFAC (formerly the Manufacturers Radio Frequency Advisory Committee) is a Commission-certified frequency coordinator.

¹⁵ *Petition for Reconsideration of the National Association of Manufacturers and MRFAC, Inc.*, Dec. 22, 2004.

¹⁶ *Id.* at 2 citing *800 MHz R&O* 19 FCC Rcd at 15127-28 ¶ 337.

¹⁷ *Motion* at 4 (emphasis added).

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ See Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, *Notice of Proposed Rule Making*, WT Docket 02-55, 17 FCC Rcd 4873, 4875 ¶ 2, 4918 ¶ 86 (2002) (*800 MHz NPRM*). Prior to the *800 MHz NPRM*, the Commission solicited comment on whether to permit CMRS use of PLMR frequencies in the 900 MHz land mobile band. See Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, 22760-61 (2000).

²¹ LMCC has not explained the nature of its asserted evidence, much less that it has not had the opportunity to present it earlier. In this connection the Commission has reiterated that a party may not “sit back and hope that a

(continued....)

when all the stay proponent offers is speculation about evidence that may or may not be submitted by third parties in the context of “comments” submitted in response to another party’s *Petition for Reconsideration*.²² Accordingly, we find LMCC has not made the “strong showing” that it will prevail on the merits that the *Virginia Petroleum* standard demands.

2. There Has Been No Showing of Irreparable Injury.

6. In order to justify a stay, a movant must substantiate an injury that is “both certain and great.”²³ LMCC’s irreparable injury argument rests on the conclusion that 900 MHz PLMR licensees would encounter interference if: (a) pending 900 MHz applications were granted; (b) the resultant licensees applied for modification of their licenses to convert to CMRS operation; (c) the Commission granted the modification applications; and (d) the licensees employed “incompatible system designs” generating interference that “could cause irreparable harm.”²⁴ The litany of “ifs” attendant on LMCC’s claim renders it too speculative for us to conclude that injury is certain. The United States Court of Appeals for the District of Columbia has held that to merit a stay, the harm alleged must be: “actual and not theoretical.... Bare allegations of what is likely to occur” are not sufficient, because the test is whether the harm “will in fact occur.”²⁵ We also note that LMCC’s *Motion* is internally inconsistent on the issue of the alleged harm being “great,” because, later, in arguing that the public interest would be served by a stay, LMCC says that 900 MHz CMRS operations will occur only “on a limited number of these channels in few geographic areas.”²⁶

7. Moreover, LMCC has not established that its perceived harm is imminent. The 900 MHz applications that concern LMCC have not been granted, the Commission has frozen the acceptance of additional new applications, Nextel has represented that it will withdraw “over half” of such applications and the remaining applications, if processed, would be subject to the Commission’s criteria applicable to PLMR applications.²⁷ Moreover, as the Commission noted in the *800 MHz R&O*, the interference potential of cellular-architecture systems is now sufficiently well known that licensees designing such systems in the 900 MHz Band are better equipped to take interference abatement into account.²⁸ Without minimizing the importance of the communications of certain of LMCC’s constituents, we also note that there are no public safety systems in the 900 MHz Band.²⁹ Finally, LMCC has failed to demonstrate that the usual review procedure accorded petitions for reconsideration – rather than the extraordinary remedy of a stay – is not adequate to deal with the harm that LMCC predicts. The foregoing factors, taken

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decision will be in its favor, and then, when it isn’t, to parry with an offer of more evidence.” See e.g., *Colorado Radio Corp. v. FCC*, 118 F. 2d 24, 26 (D.C. Cir. 1941).

²² We note that the Commission’s Rules make no provision for “comments” in response to a Petition for Reconsideration. 47 C.F.R. § 1.429.

²³ *Wisconsin Gas Co. v. FERC*, 754 F.2d 669, 674 (D.C. Cir. 1985).

²⁴ *Motion* at 5.

²⁵ *Wisconsin Gas Co. v. FERC*, 754 F.2d at 674.

²⁶ *Motion* at 6.

²⁷ See ¶ 1, *supra*.

²⁸ See *800 MHz R&O*, 19 FCC Rcd at 15127 ¶ 336. Likewise, 900 MHz licensees electing “high-site” systems may design them more robustly to ensure higher levels of desired signal. In general, interference is a function of the ratio of the desired and undesired (potentially interfering) signal. Hence, more robustly designed systems are inherently more interference resistant. However, the Commission stated that it would “not hesitate to act should it appear that the interference environment in the 900 MHz band is becoming unfavorable.” *Id.*

²⁹ See *800 MHz R&O*, 19 FCC Rcd at 15127 ¶ 336.

together, persuade us that LMCC has failed to substantiate that a certain and great injury is imminent here. Accordingly, we find that the second prong of the *Virginia Petroleum* test has not been met.

3. Other Parties to the Proceeding Would be Harmed if a Stay Were Granted.

8. Virtually every major public safety organization in the United States has filed comments in this proceeding underscoring the fact that unacceptable interference to public safety communications systems is a life and death issue that must be addressed by the Commission as soon as possible.³⁰ Indeed, the Commission has concluded: “There may be no matter within [the FCC’s] jurisdiction more crucial to Homeland Security and the overall general safety of life and property than assuring that public safety communications systems are free from unacceptable interference”³¹ Band reconfiguration -- the solution to this life-threatening problem -- is poised to begin.³² In the *800 MHz R&O* we noted that use of the 900 MHz Band for CMRS operation was an integral part of the reconfiguration of the 800 MHz Band because Nextel would have to relocate certain of its operations to the 900 MHz Band in order to sustain service to subscribers during 800 MHz Band reconfiguration.³³ By February 7, 2005, Nextel must indicate assent to our *800 MHz R&O*, as modified by the *Supplemental Order*, by filing certain documents including, *inter alia*, financial guarantees. Should that not occur, 800 MHz band reconfiguration could be delayed or, in the worst case, be rendered impossible. The resultant harm is patent: police, firefighters, emergency medical service (EMS) providers would be deprived of reliable 800 MHz communications to the detriment of the citizens whose lives and property they protect.³⁴ Therefore, we conclude that LMCC has not met the burden imposed on it by the third prong of the *Virginia Petroleum* test: showing that a stay would not harm other parties to the proceeding.

4. A Stay Would Disserve the Public Interest.

9. LMCC argues that the public’s interest in avoiding potential interference to 900 MHz Band systems “far outweighs the potential benefits of immediate commercial operations on a limited number of these channels in a few geographic areas.”³⁵ However, as we have shown herein, that characterization substantially ignores the public interest benefits articulated in the *800 MHz R&O*. The real issue is whether speculation about theoretical interference to future 900 MHz systems justifies delaying abatement of the actual harmful interference being caused now to 800 MHz public safety and Critical Infrastructure Industry systems. *Virginia Petroleum* and its progeny³⁶ teach us that we cannot elevate the theoretical over the actual, the distant over the immediate, or the speculative over the concrete when we evaluate the justification for a stay. We therefore conclude that LMCC has not satisfied the last prong of the *Virginia Petroleum* test: demonstrating that its requested stay is in the public interest.

³⁰ See, e.g., Supplemental Comments of the Consensus Parties (Dec. 24, 2002).

³¹ *800 MHz R&O*, 19 FCC Rcd at 14975 ¶ 7.

³² The Transition Administrator – the independent entity overseeing the process – is required to file the schedule for region-by-region reconfiguration of the 800 MHz band with the Commission within the next seven days. The reconfiguration process will commence shortly thereafter. See Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Order*, DA 04-3676 (PSCID, WTB 2004).

³³ See *800 MHz R&O*, 19 FCC Rcd at 15127 ¶ 336; *900 MHz Freeze Order*, 19 FCC Rcd at 18277. In so saying, we do not intend to imply that the acquisition of PLMR licenses and converting them to CMRS use is the only means for affording Nextel access to such spectrum. See *900 MHz Freeze Order* 19 FCC Rcd at 18278.

³⁴ See *800 MHz R&O*, 19 FCC Rcd at 14977 ¶ 11.

³⁵ *Motion* at 6.

³⁶ See n. 13 *supra*.

B. LMCC'S CONCERNS MAY BE ADDRESSED SHORT OF STAYING SECTION 90.621(f) OF THE RULES.

10. Although LMCC has not met the stringent standards required to justify the extraordinary remedy of a stay, we do not reject its concerns out of hand. Indeed, we registered our own concerns about the filing of large numbers of suspect 900 MHz applications when we imposed the *900 MHz Freeze*.³⁷ Although we are maintaining that freeze in force, our concerns have been lessened somewhat by the representations made in the Nextel *Opposition*. Specifically, Nextel's indicates that it will withdraw most of the ACI-900 applications, and acknowledges that all 900 MHz PLMR applicants – Nextel included – have the burden of demonstrating both eligibility and need. Nextel also acknowledges that conversion from PLMR to CMRS operation is not “automatic” but must be accomplished only pursuant to an application for modification of license and that 900 MHz cellular-architecture systems may be designed in a manner that does not present the interference potential feared by LMCC. Accordingly, to afford Nextel the opportunity to specify the 900 MHz applications it wishes to withdraw, we are suspending processing of all ACI-900 applications, until further notice. We believe the foregoing factors should assuage many of LMCC's concerns about imminent harm,³⁸ and that, by denying the LMCC *Motion*, we preserve the public interest benefits the Commission articulated in the *800 MHz R&O*, in furtherance of its mandate to promote safety of life, health and property through radio communications under the Communications Act, as amended.³⁹

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.41 and 1.43 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.43 that the Motion for Partial Stay of the Land Mobile Communications Council, in the above-captioned proceeding, filed January 12, 2005, IS DENIED.

12. It is FURTHER ORDERED pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.41 and 1.43 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.43, that the processing of applications submitted by ACI-900, Inc. for 900 MHz facilities SHALL BE SUSPENDED until further notice.

13. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Chief,
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Wireless Telecommunications Bureau

³⁷ See ¶ 2 *supra*.

³⁸ All other 900 MHz applications for new licenses pending before the freeze was imposed will be processed and, of course, held to the referenced eligibility and need standards. Contrary to Nextel's apparent misperception, *Opposition* at 10, the *900 MHz Freeze Order* does not apply to applications for modification of license or to renewals or transfers. See *Freeze Order*, 19 FCC Rcd at 18278, n. 8.

³⁹ See 47 U.S.C. § 151.